



Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by R.T.
AICAC File No.: AC-03-56

PANEL: Ms. Laura Diamond, Chairperson
Ms. Barbara Miller
Mr. Neil Cohen

APPEARANCES: The Appellant, R.T., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Tom Strutt.

HEARING DATE: March 3, 2005

ISSUE(S): 1. Entitlement to coverage for treatment benefits;
2. Entitlement to Income Replacement Indemnity benefits
from September 7, 2001 to November 15, 2001, both
inclusive.

RELEVANT SECTIONS: Sections 81(1) and 136(1) of The Manitoba Public Insurance
Corporation Act ('MPIC Act')

**MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE
PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING
PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

Reasons For Decision

The Appellant, R.T., was injured in a motor vehicle accident on November 24, 2000. He was in receipt of Income Replacement Indemnity ('IRI') benefits until February of 2001, when he returned to work full time at his employment with [text deleted]. He was also in receipt of treatment benefits until June 2001.

In September 2001 the Appellant experienced an alleged recurrence or exacerbation of pain symptoms and was off work until November 15, 2001. He received physiotherapy treatments funded by MPIC on September 7th, 13th, 19th and 21st, 2001. However, MPIC declined to pay for any further treatment benefits, including trigger point needling, after that point, and declined to pay his IRI benefits from September 7th to November 15th, 2001.

Internal Review Decision

On January 30, 2003, an Internal Review Officer for MPIC dismissed the Appellant's claim for further treatment benefits and for IRI benefits between September 7th and November 15th, 2001. The Internal Review Officer found that the Appellant had a significant history of problems with his thoracic spine, both before and after the November 24, 2000 accident. The Internal Review Officer found that the problems following the motor vehicle accident of November 24, 2001 were new injuries involving the neck, and were not connected to his symptoms in September 2001. He stated:

. . . When I take into account the apparent resolution of your symptoms following the November 24, 2000 accident, the length of time that elapsed following your return to work before the onset of symptoms and the significant alteration of work place duties, I am unable to conclude that the symptoms you experienced in September 2001 are causally connected to the motor vehicle accident of November 24, 2000. . . .

It is from this decision of the Internal Review Officer that the Appellant has now appealed.

Submissions

The Appellant testified that while he had been involved in previous car accidents and had suffered a hockey injury in 1996, he had been asymptomatic for a year and a half (1 ½) prior to the motor vehicle accident. He worked two hundred and sixty (260) days in the year 2000, before the accident occurred.

Once the Appellant returned to the workplace, he found that he could not do all the duties of his job, especially overhead work. He had been able to perform all of the duties of his job prior to the accident. However, following the accident he had to make modifications regarding overhead work. He also had difficulty vacuuming the pool. His co-workers assisted him in making modifications, carrying out the duties which he could not complete. The documentary evidence on the file included a letter from his co-workers confirming this arrangement.

After his return to work, the Appellant continued to go for some physiotherapy treatments and to go to the gym, in order to rehabilitate himself. Since the accident he suffered from pain which wrapped around his chest and ribs through his back, as well as neck pain. He stated that following a motor vehicle accident in 1997 he had similar pain but not as high up and that following his hockey accident, the pain was lower in his back. The Appellant also testified that his only other back problems, besides the accidents referred to above, involved disc surgery nine (9) years ago, from which he recovered. Before the recent motor vehicle accident, he was involved in power lifting and had led an active life, always working hard to overcome the injuries suffered in his accidents and to return to work.

The recurrence of his symptoms occurred following a shut down of the pool when he was working at sanding down lockers. This had required a good deal of overhead work. He took time off from work, using his sick credits, and attended physiotherapy, which MPIC paid for. He also saw Dr. Dubo, who had treated him previously, for trigger point injections. When his sick credits were exhausted, he applied to MPIC (who had paid for some of the most recent physiotherapy treatments), for IRI benefits as well.

It was the position of the Appellant that while he was still very strong and could perform tasks like planting trees or spreading gravel, his difficulties with duties such as vacuuming the pool out or overhead work had only occurred since the November 2000 motor vehicle accident.

Submission of MPIC

Counsel for MPIC submitted that the Appellant had a significant prior history of back problems including herniated discs in 1989, work absence from 1990 to 1993 because of a work related injury which involved myofascial trigger points, ten (10) months off work after an injury to his thoracic spine in a hockey game in April of 1996 and a motor vehicle accident Worker's Compensation Board Claim in 1997.

It was the position of MPIC that the symptoms the Appellant experienced in September 2001 related to his previous history and prior condition of myofascial pain syndrome, and not to injuries sustained in the accident of November 2000.

Counsel for MPIC submitted that, in fact, the Appellant's pain following the motor vehicle accident was in a different location from the pain he suffered prior to the accident and in the fall of 2001. It was submitted that the pain described following the November 2000 accident was at the T3 and T8 levels as well as in the T12-L1 right quadrant and, six (6) weeks later, L3 in the left quadrant. He submitted that there was no reference to arm or neck pain after the motor vehicle accident. However, in the fall of 2001, a new pain developed in the right arm and forearm and at T2-T3, T5-T6, L2 and L3. This was not a recurrence or exacerbation of the symptoms caused by the motor vehicle accident.

Rather, the Appellant had recovered from the motor vehicle accident, it was submitted, and the difficulties he encountered in September 2001 were new problems brought on by repetitive strain resulting from his workplace activities.

Counsel for MPIC referred to the opinion of Dr. Baydock, Medical Consultant for MPIC's Health Care Services Team in submitting that the September 2001 problems represented new developments caused by the Appellant's doing intensive repetitive work, in part overhead, sanding lockers. This repetitive muscle use was associated with the development of trigger points and had put the Appellant's upper back and shoulder girdle at a mechanical disadvantage. Given the Appellant's history and his predisposition to developing myofascial problems, the awkward work caused the symptoms in September 2001 and not the motor vehicle accident which had occurred almost a year earlier.

Appellant's Reply

In reply, the Appellant referred to the opinion of his treating physician, Dr. Dubo, who has opined that there was no relationship between the Appellant's symptoms in September of 2001 and his history prior to the motor vehicle accident.

As well, the Appellant argued that the symptoms in September of 2001 did not involve a new pain area. Rather, he argued that trigger points can all be connected and refer pain. Sometimes new trigger points can be awakened through the treatment process. As well, he maintained that in September 2001, he suffered pain in the same areas where pain was referred following the motor vehicle accident, and pointed to pain diagrams on the file which had been prepared following the accident. These showed pain radiating down the left arm and upwards to a spot, marked with an "x", above the shoulder blades. He also pointed to references in the

physiotherapist's notes following the motor vehicle accident to problems with his latissimus dorsi. Injuries in this area can refer pain to the arm.

Discussion

In order to qualify for funding under the Personal Injury Protection Plan contained in the MPIC Act and Regulations, expenses must be incurred by a victim because of the accident. The relevant sections of the MPIC Act and Regulations are as follows:

Section 81(1) of the MPIC Act provides:

Entitlement to I.R.I.

81(1) A full-time earner is entitled to an income replacement indemnity if any of the following occurs as a result of the accident:

- (a) he or she is unable to continue the full-time employment;
- (b) the full-time earner is unable to continue any other employment that he or she held, in addition to the full-time regular employment, at the time of the accident;
- (c) the full-time earner is deprived of a benefit under the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) to which he or she was entitled at the time of the accident.

Section 136(1) provides:

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care;
- (b) the purchase of prostheses or orthopedic devices;
- (c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;
- (d) such other expenses as may be prescribed by regulation.

The onus is on the Appellant to show that treatment is medically required and he is unable to continue his full-time employment, both as a result of the accident.

The question in this appeal is whether the difficulties encountered by the Appellant in September 2001 were connected to the motor vehicle accident or whether they were as a result of a pre-existing condition and/or the repetitive overhead work assignment of cleaning and sanding lockers.

The evidence of the Appellant's co-workers, as stated in the letter dated December 5, 2001 supports the Appellant's position that he never fully recovered from the effects of the motor vehicle accident and that his co-workers assisted him in modifying duties in the workplace for him, and taking on duties that he had been able to perform prior to the accident.

Prior to the accident [R.T.] on occasion as required, would do his full job requirements, including vacuuming and maintenance of the aquatic area related to the pool, and did so willingly . . .

. . . however, I wish to point out that he did not return to his full active duties performed prior to the accident of November, and to this day since that accident occurred, has not been able to vacuum the pool or perform any brushing of its sides because of pain related dysfunction that occurs during and following the activity trying to be performed.

He also has been greatly restricted in the performance of any overhead work where his arms remained in an extended period for any length of time . . . and to date I will verify . . . can only do such work very intermittently.

When this became apparent to Keith and I on the night shift, we voluntarily agreed amongst ourselves to ensure [R.T.] could remain productive and active in the workplace . . . to perform this type of the work assigned to our shift described above, between Keith and I . . .

The Appellant's treating physician, Dr. Dubo, in his opinion of November 8, 2002, made it quite clear that in his view the Appellant's difficulties in the fall of 2001 were connected to the motor vehicle accident.

Although Dr. Baydock, Medical Consultant to MPIC's Health Care Services Team disagreed with Dr. Dubo in his Inter-Departmental Memorandum dated December 5, 2002 he failed to offer a definitive explanation to the contrary. Dr. Baydock states:

The alterations in opinions provided make it difficult to directly associate one event with another insofar as the reported exacerbations and resolutions of these conditions appear to have become altered over time.

. . . It would be difficult, in my opinion, to assign direct blame to one event (in this case the November 2000 motor vehicle collision) and not take into consideration the two previous traumatic events which lead to the development of this condition. . . . For these reasons, it is my opinion that the exacerbation of pain symptoms attributed to myofascial (sic) pain (sic) syndrome which occurred in September 2001 was not probably related to the motor vehicle collision.

However, as noted by the Appellant, Dr. Baydock did not have the opportunity to examine him.

The Appellant testified at the hearing and the Commission found him to be credible in regard to his descriptions of his pain and experience. Dr. Dubo had the opportunity to examine the Appellant and assess both his credibility and his symptoms before the motor vehicle accident, after the motor vehicle accident and after his alleged relapse. He is also considered a specialist in the area of myofascial pain.

The Appellant's contention that he never fully recovered from the accident was echoed in Dr. Dubo's comments of November 8, 2002:

. . . In my letter of June 19, 2001 I stated that he had progressive improvement and documented the findings, treatment and outcome following each treatment visit. He was able to return to work and I did not place any restrictions at that time. He had no pain symptoms at rest or for ordinary work activity. He did note that he had some difficulty with carrying out work with his arms overhead and extended but felt that this was not required on a regular basis in the work place.

Dr. Dubo was unequivocal in his view that the Appellant's earlier history was not a factor in the symptoms he encountered from September to November of 2001. He made it clear that he had earlier been in error in concluding that the problems from the motor vehicle accident were resolved:

. . . it is my opinion that he continued to have intermittent symptoms after I completed my treatment in April 2001. Although the symptoms were not severe enough to prevent him from continuing at work, he did have to modify his work and rely on his co-workers to carry out the type of work that aggravated and precipitated symptoms. When he refrained from that type of work he could continue to function without difficulty. However, the change in job duties after pool shutdown overloaded his muscles for many days at a time and after two weeks his symptoms were too acute and severe causing him to be off work and return for further treatment.

In retrospect it would have been better to have intervened while he was still having his intermittent symptoms in order to carry out further treatment directed at the residual myofascial trigger points causing those symptoms i.e. mid to upper thoracic region and latissimus dorsi muscles. This likely would have prevented the more acute and prolonged flare up of pain symptoms and dysfunction that occurred in early September 2001.

Dr. Dubo's opinion was also clear and unequivocal in relating the Appellant's difficulties to the motor vehicle accident.

. . . Despite the fact that I stated in my June 19, 2001 report that he had recovered and required no further treatment subsequent events indicate that he did have ongoing symptoms of complaint after he returned to more vigorous type of work. This indicates that in fact all of his myofascial trigger points were not completely eradicated but became quiescent for ordinary activities leading me to feel that he did not require any further treatment as of June 2001. I have documented the events and reasons that led me to change my mind with the requirement for further treatment in relationship to the motor vehicle accident of November 24, 2000.

In conclusion, based on my further evaluation of [R.T.'s] history and physical findings after I saw him again on September 21, 2001, it is my opinion based on the balance of probabilities that his exacerbation of symptoms and dysfunction following a change in work duties, was related to problems arising from the motor vehicle accident of November 24, 2000.

The onus is on the Appellant to satisfy the Commission that the difficulties he encountered in September 2001 were a result of the motor vehicle accident of November 2000. It is the view of

the Commission that the weight of evidence, particularly the clearly stated opinion of Dr. Dubo, supports the Appellant's position. Dr. Dubo is a specialist in the area who was familiar with the Appellant and his history, injuries and symptoms. The panel is of the view that his expert opinion carries sufficient weight to meet the onus on the Appellant in this case.

Accordingly, the Commission is of the view that the Appellant should be entitled to coverage for treatment benefits and to IRI benefits from September 7, 2001 to November 15, 2001 inclusive.

The decision of MPIC's Internal Review Officer dated January 30, 2003 is therefore rescinded. The Appellant shall be entitled to reimbursement for treatment benefits and IRI benefits from September 7, 2001 to November 15, 2001. Interest in accordance with Section 167 of the MPIC Act shall be added to that amount.

Dated at Winnipeg this 30th day of March, 2005.

LAURA DIAMOND

BARBARA MILLER

NEIL COHEN